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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6234

DATE COMPLAINT RECEIVED: 11/20/09

LAST RESPONSE RECEIVED: 3/23/10

DATE ACTIVATED: 1/29/10

EXPIRATION OF SOL: 5/1/13 – 8/7/13

COMPLAINANT: Citizens for Responsibility and Ethics in Washington

RESPONDENTS: Friends of Mary Landrieu, Inc. and Nancy Marsiglia, in her official capacity as Treasurer
Unknown Respondents

RELEVANT STATUTES AND REGULATIONS: 2 U.S.C. § 434(b)(4)(F) & (5)(E);
2 U.S.C. § 441a(a)(1)(A) & (3)
2 U.S.C. § 441b(a)
2 U.S.C. § 441c
2 U.S.C. § 441f
11 C.F.R. § 103.3(b)(1) & (2)
11 C.F.R. § 104.3(b)(2)(v)(A)
11 C.F.R. § 110.4(b)(iii)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

Citizens for Responsibility and Ethics in Washington ("CREW") alleges that the Friends of Mary Landrieu, Inc. and Nancy Marsiglia, in her official capacity as treasurer, ("Landrieu Committee") violated the Federal Election Campaign Act of 1971, as amended, ("the Act") by disgorging \$25,300 in illegal contributions to the United States Treasury ("Treasury"), instead of refunding the contributions to the contributors.

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1 11 C.F.R. § 103.3(b)(1) & (2). The complaint also asserts that the Landrieu Committee
2 should have disclosed the required refunds to those contributors in accordance with
3 11 C.F.R. § 104.3(b)(2)(v)(A). In addition to requesting that the Commission find reason
4 to believe that the Landrieu Committee violated the Act and impose appropriate
5 sanctions, CREW requests that any information the Commission obtains during the
6 course of its inquiry be referred to the Department of Justice for investigation of possible
7 violations of 2 U.S.C. §§ 441b(a) and 441f.

8 The Landrieu Committee denies violating the Act or Commission regulations with
9 respect to disbursing the \$25,300 to the Treasury and urges the Commission to dismiss
10 the matter. The Landrieu Committee states that because it had sufficient information to
11 question the legality of these contributions and was unable to determine the identity of
12 the original contributor(s), its decision to disgorge the funds to the Treasury was
13 permissible and compatible with the guidance provided by the Commission in both
14 Advisory Opinions ("AOs") and in Matters Under Review ("MURs").

15 For the reasons set forth below, we recommend that the Commission exercise its
16 prosecutorial discretion and dismiss the allegations that the Friends of Mary Landrieu,
17 Inc. and Nancy Marsiglia, in her official capacity as treasurer, violated 11 C.F.R.
18 § 103.3(b)(1) or (2) and the related reporting requirements by disgorging the
19 contributions at issue in this matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

20 Even so, the available information indicates that the Landrieu Committee received
21 contributions totaling \$25,300, which may have come from a prohibited source(s) or were
22 made in the name of another. Currently, we have no information as to which person(s) or
23 entity or entities provided the funds used to make these potentially illegal contributions.

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As discussed in more detail below, this Office recommends that the Commission find reason to believe that Unknown Respondents violated 2 U.S.C. §§ 441a(a)(1)(A) & (3), 441b, and/or 441f and authorize an investigation.

II. FACTUAL BACKGROUND

In May of 2008, the Landrieu Committee received a series of six contributions payable by cashier's checks issued by Whitney National Bank in New Orleans, L.A. The contributions, which totaled \$25,300, were forwarded to the campaign by a Louisiana attorney who the Landrieu Committee has declined to identify. Response at 2. At some point after receiving these funds, the Landrieu Committee became suspicious that the contributions were from a prohibited source or had been made in the name of another because they were received as sequentially numbered checks from the same bank. Supplemental Response at 1.¹ The Landrieu Committee, which apparently obtained the names of the putative contributors from the Louisiana attorney, attempted to confirm the legality of each contribution by contacting these individuals by mail and telephone. Response at 2. One of these individuals told the Committee that she had no knowledge of making any contribution to the campaign. *Id.*; Supplemental Response at 1. Based on this information, the Landrieu Committee concluded that there was "sufficient basis to question the lawfulness" of each contribution forwarded by the Louisiana attorney.

¹ The response did not identify the Louisiana attorney who forwarded the subject contributions, specify from what source the committee obtained the names of the individual contributors, provide any details regarding the contributions such as the amounts of each contribution and the date of receipt, or describe what efforts were made to discover the identity of the original contributor(s). On March 18, 2010, this Office sent the Landrieu Committee a letter inviting it to clarify or amplify its response with respect to the circumstances that caused the campaign to disgorge the contributions at issue, including, but not limited to, the circumstances prompting it to seek confirmation of their legality. The Landrieu Committee's response, dated March 23, 2010, stated in pertinent part that the sequential numbering of the contribution checks from the same bank caused it to seek to confirm the legality of the six contributions forwarded by the same Louisiana attorney.

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Response at 2. The Landrieu Committee states that it "took immediate ameliorative action" by making a \$25,300 disbursement to the Treasury because it was unable to discover the identities of the original contributors. *Id.* The Landrieu Committee described the August 7, 2008, disbursement in its 2008 Pre-Primary report as a "donation." Complaint at Exhibit A.²

CREW contends that the Landrieu Committee violated 11 C.F.R. § 103.3(b)(1) & (2) when it disgorged the \$25,300 to the Treasury rather than return the funds to the contributors. Complaint at 5. According to the complaint, sections 103.3(b)(1) and (2) require committees to return contributions to the contributors when they suspect or later discover that a contribution is illegal. *Id.* at 4. Citing a series of AOs, the complaint contends that the Commission does not permit political committees to disgorge illegal contributions at will, but only permits such disgorgement in "one unique situation" when the committee learns that the Justice Department is pursuing a criminal investigation or prosecution relating to the contributions. Complaint at 4 and 5; *citing* AO 1996-5 (Kim), AO 1995-19 (Indian-American Leadership Fund), AO 1991-39 (D'Amato), AO 1989-5 (Ray), and AO 1984-52 (Russo)

The Landrieu Committee denies that disgorging the \$25,300 to the Treasury violated the Act or Commission regulations. According to the Landrieu Committee, it followed Commission advice in making a disbursement in an amount equal to the

² An online news article attached to the complaint attempts to link the donation to a Senate Ethics Committee investigation of Senator Landrieu's 2001 request for an earmark for the Voyager Expanded Learning literacy program, which also apparently stemmed from a CREW complaint. Complaint at Exhibit B (Arthur Delaney, *Why Did Sen. Landrieu's Campaign Donate \$25,300 to the Government*, HUFFINGTON POST.COM, November 13, 2009). Nevertheless, it does not appear that anyone who worked for Voyager Expanded Learning or its affiliate Best Associates contributed to the Landrieu Committee in May of 2008.

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1 contributions to the Federal government, state or local governments, or to a qualified
 2 charity when there is a "factual dispute as to the actual source of the contributions."
 3 Response at 3, *citing* AO 1995-19 (Indian-American Leadership Fund), and AO 1991-39
 4 (D'Amato). The Landrieu Committees contends that its decision to disgorge the
 5 contributions was permissible because it had sufficient reason to question the legality of
 6 the contributions and could not determine the identity of the original contributor(s). The
 7 response asserts that in similar cases, the Commission has advised political committees to
 8 disgorge contributions of questionable legality where identified donors do not confirm
 9 their legality and where the committee cannot determine the identity of the original
 10 contributor. Response at 3-4. Citing AOs 1995-19 (Indian-American Leadership Fund)
 11 and 1991-39 (D'Amato), the Landrieu Committee contends that the Commission has
 12 "never required" evidence of indictment, conviction, or formal investigation before
 13 advising political committees to disgorge illegal contributions. *Id.* The Landrieu
 14 Committee also notes that in enforcement cases such as MUR 5279 (Kushner)(2004) the
 15 Commission has requested that political committees "either refund *or disgorge*" illegal
 16 contributions within 30 days even if they know the identity of the contributor. Response
 17 at 3 (emphasis in original).

18 **III. LEGAL ANALYSIS**

19 During the 2008 election cycle, the Act provided that no person shall make
 20 contributions to a candidate for federal office or his or her authorized political committee,
 21 which in the aggregate exceeded \$2,300 for the primary and general elections,
 22 respectively. 2 U.S.C. § 441a(a)(1)(A). Individuals are also subject to a biennial limit on
 23 contributions made to federal candidates, party committees and political action

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1 committees. 2 U.S.C. § 441a(a)(3). Under the Act, corporations and national banks are
2 prohibited from making contributions or expenditures from their general treasury funds in
3 connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a).
4 Corporate officers are prohibited from consenting to contributions made by the
5 corporation or national bank. *Id.* It is unlawful for a political committee to accept or
6 receive any contribution prohibited by 2 U.S.C. § 441b(a). The Act also provides that
7 no person shall make a contribution in the name of another person. 2 U.S.C. § 441f. It is
8 a violation of the Act to knowingly help or assist any person in making a contribution in
9 the name of another. 11 C.F.R. § 110.4(b)(iii). Political committees are not liable for the
10 receipt of impermissible contributions provided the committees adhere to the safe harbor
11 regulations set forth in 11 C.F.R. § 103.3(b)(1) & (2).

12 Committee treasurers are responsible for examining all contributions for evidence
13 of illegality. 11 C.F.R. § 103.3(b). Contributions that, when received, present genuine
14 questions as to whether they were made by corporations, labor organizations, Federal
15 contractors, or foreign nationals may either be deposited into a campaign depository or
16 returned to the contributor within ten days of receipt. 11 C.F.R. § 103.3(b)(1). If any
17 such contribution is deposited, the treasurer shall make his or her best efforts to
18 determine the legality of the contribution and make a refund if it cannot be determined to
19 be legal. *Id.* The treasurer is deemed to have made best efforts only if s/he made at least
20 one written or oral inquiry concerning the legality of the contribution. *Id.* Evidence of
21 legality includes a written explanation from the contributor, or an oral explanation which
22 is noted by the treasurer in a subsequent memorandum. Explanation and Justification
23 *Deposits of Receipts and Disbursements*, 52 Fed. Reg. 6, (Jan. 9, 1987) at 768. If the

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1 contribution cannot be determined to be legal, the treasurer shall, within thirty days of
 2 receipt, refund the contribution to the contributor. 11 C.F.R. § 103.3(b)(1).

3 When the treasurer of a political committee deposits a contribution and, based on
 4 new evidence not available to the political committee at the time of receipt and deposit,
 5 discovers that it came from a prohibited source or was made in the name of another, the
 6 treasurer shall refund the contribution within thirty days of the date on which the
 7 illegality was discovered. 11 C.F.R. § 103.3(b)(2). Political committees are required to
 8 disclose contribution refunds as disbursements on their periodic reports to the
 9 Commission. 2 U.S.C. § 434(b)(4)(F) & (5)(E); 11 C.F.R. § 104.3(b)(2)(v)(A).

10 In several early Advisory Opinions, the Commission advised political committees
 11 that they must refund illegal contributions to the person or entity that was the actual
 12 source of those contributions. See AO 1984-52 (Russo) and AO 1989-5 (Ray)
 13 (contributions financed by corporations through sham employee bonuses should be
 14 refunded to the corporate sources and not the employee conduits). Contrary to the
 15 assertions made in the complaint, however, the Commission has not always required
 16 refunds pursuant to section 103.3(b) and has never made the involvement of the Justice
 17 Department a prerequisite for disgorgement. It appears that the Commission has
 18 recommended disgorgement where the available evidence raised doubts as to the legality
 19 of the contribution, but there was a factual dispute as to the actual source of the
 20 contribution. AO 1995-19 (Indian-American Leadership Fund) and 1991-39 (D'Amato).
 21 In AO 1996-5 (Jay Kim for Congress Committee), the Commission gave the political
 22 committee the option of disgorging the funds to the Treasury instead of the original
 23 contributor, a corporation that had pled guilty to making illegal contributions. AO 1996-

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5 explicitly superseded AOs 1984-52 and 1989-5 and earlier Advisory Opinions to the extent they determined that payments could only be made to the entity that was the actual source of the illegal contribution.

The available information indicates that the Landrieu Committee received contributions in May 2008 that it came to believe were prohibited or made in the name of another. Although there is no information as to the specific date(s) that it became aware of the contributions' likely illegality, there is no reason to question that it took remedial

³ The Commission's practices with respect to disgorgements and refunds were at issue in *Fireman v. United States*, 44 Fed. Cl. 328 (1997). In *Fireman*, a political committee, in reliance on AO 1996-5, disgorged to the Treasury illegal contributions it had received from Simon C. Fireman and his company after the political committee's treasurer learned that Fireman had pled guilty to making illegal contributions. *Id.* at 530. Fireman filed suit against the government to recover the amount of the disgorged illegal contributions from the Treasury, arguing that Commission regulations required political committees to refund illegal contributions to the contributors, and that any AOs permitting disgorgement instead of refund are contrary to Commission regulations and beyond the Commission's authority. While the Court did not explicitly rule on whether the Commission exceeded its authority in AO 1996-5, it did find that Fireman "presented a prima facie case that the FEC acted without authority in its decision in AO 1996-5." *Id.* at 537. The court further stated that the language in the regulation "seems clear enough on its face" and that "11 C.F.R. 103.3(b)(2) authorizes the return of illegal campaign money." *Id.* at 538-9. Because the Commission had changed its position from earlier AOs, the Court noted that the "new interpretation is entitled to less deference." *Id.* at 538 (citing *Pattley v. BankAmerica Minn. Inc.*, 361 U.S. 690, 698 (1991)). The *Fireman* decision concludes that section 103.3(b)(2) essentially creates a right or expectation on the contributor that its illegal refund will be refunded. After *Fireman*, the Commission began requesting that contributors in MURs involving illegal contributions sign waivers of their refund rights when disgorgements were required. See MUR 6074 (Jacobs)(2008).

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1 steps to rid itself of the funds within the applicable regulatory timeframes. *See* 11 C.F.R.
2 § 103.3(b). While section 103.3(b) mandates refunds to contributors, requiring that the
3 Landrieu Committee refund these illegal contributions would be difficult, given the
4 committee's stated inability to locate the original source(s) of the funds and because
5 recent Commission decisions have permitted disgorgements. In the numerous AOs and
6 MURs referenced *supra* at 7-8, the Commission has advised or instructed political
7 committees to disgorge illegal contributions even in cases where the name(s) of the
8 original contributor(s) were known. Accordingly, we recommend that the Commission
9 exercise its prosecutorial discretion and dismiss the allegations that the Friends of Mary
10 Landrieu, Inc. and Nancy Marsiglia, in her official capacity as treasurer, violated
11 11 C.F.R. § 103.3(b)(1) or (2) and the related reporting requirements by disgorging the
12 contributions at issue in this matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

13 Notwithstanding the issue of whether the Landrieu Committee disposed of the
14 illegal contributions properly, there is reason to believe that some individual(s) or
15 entity(ies) may have made illegal contributions to the Landrieu Committee. There is
16 sufficient information presented in the responses to pursue what appear to be underlying
17 section 441a(a), 441b and/or 441f violations against the unknown original source(s) of
18 the contributions and possibly against the unknown conduits ("Unknown Respondents").
19 The Landrieu Committee's responses outline a scenario in which the campaign received
20 \$25,300 in contributions that it ultimately determined were impermissible, either because
21 the funds came from a prohibited source(s) or were made in the name of another, or both.
22 Response at 2 and Supplemental Response at 1. As described *supra* at 3, the Landrieu
23 Committee suspected the contributions were illegal because they were made using

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1 sequentially numbered cashier's checks from the same bank. These suspicions, which
 2 were serious enough to prompt the campaign to contact each of the putative contributors
 3 by mail and telephone, were apparently confirmed when one of these individuals stated
 4 she did not know anything about making the contribution attributed to her. Response at
 5 2. Without describing what steps the Landrieu Committee actually took, the response
 6 states it was unable to determine the identity of the person(s) or entity(ies) who provided
 7 the \$25,300 in contributions. *Id.* Thus, it appears that the original source(s) of the
 8 contributions at issue may have made illegal contributions in the name of another and
 9 potentially violated other sections of the Act, including 2 U.S.C. §§ 441a(a)(1)(A) and
 10 441b. Further, the conduits of the contributions may also have violated the Act. 2 U.S.C.
 11 §§ 441a(a)(1)(A) & (3), 441f. Accordingly, we recommend that the Commission find
 12 reason to believe that Unknown Respondents violated 2 U.S.C. §§ 441a(a)(1)(A) & (3),
 13 441b and 441f. *See* MUR 5871 (Noe) (Commission found RTB against both Thomas
 14 Noe, the source of funds in a 441f scheme, and "unknown respondents" who served as
 15 Noe's conduits in the scheme) and MUR 4919 (East Bay Democratic Committee) (the
 16 Commission found reason to believe that "persons unknown," who were responsible for a
 17 flyer containing express advocacy, knowingly and willfully violated 2 U.S.C. § 441d(a)).

18 We propose an investigation to determine whether information can be developed
 19 leading to the identity of the person(s) or entities responsible for the \$25,300 in
 20 contributions to the Landrieu Committee. It appears that some investment of
 21 Commission resources is appropriate in light of the seriousness of the potential violations
 22 at issue and the amount in violation. We will seek to uncover the identity of the original
 23 sources of the contributions at issue by examining copies of any documents maintained

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1 by the Landrieu Committee related to the six cashier's checks, contacting the Louisiana
 2 attorney who forwarded the cashier's checks, and contacting the individual contributors
 3 who ostensibly contributed the \$25,300 to the Landrieu Committee. It appears that the
 4 Landrieu Committee possesses these documents and knows the identities of the Louisiana
 5 attorney and the individual contributors. Because the Landrieu Committee has thus far
 6 declined to provide any specific information or related documents to us on an informal
 7 basis, we intend to issue a subpoena to the Landrieu Committee. See *supra* at footnote 1.
 8 Accordingly, we request that the Commission authorize an investigation and approve
 9 compulsory process. If and when the identity of the person(s) or entities responsible for
 10 the \$25,300 in contributions to the Landrieu Committee are identified, appropriate
 11 Factual and Legal Analyses for those respondents will be circulated to the Commission
 12 for approval.

13 **IV. RECOMMENDATIONS**
 14

- 15 1. Dismiss the allegations that the Friends of Landrieu and Nancy Marsiglia,
 16 in her official capacity as treasurer, violated 11 C.F.R. § 103.3(b)(1) or (2)
 17 and the related reporting requirements by disgorging the contributions at
 18 issue in this matter.
 19
- 20 2. Find reason to believe that Unknown Respondents violated 2 U.S.C.
 21 §§ 441a(a)(1)(A), 441a(a)(3), 441b and 441f.
 22
- 23 3. Approve the attached Factual and Legal Analysis for the Friends of
 24 Landrieu and Nancy Marsiglia, in her official capacity as treasurer.

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4. Authorize the use of compulsory process.

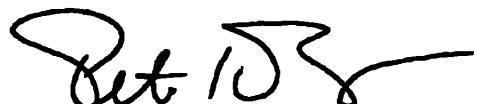
5. Approve the appropriate letter.

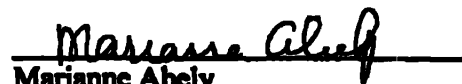
Thomasenia P. Duncan
 General Counsel

4/29/10
 Date

BY:


 Stephen Gura
 Deputy Associate General Counsel
 for Enforcement


 Peter G. Blumberg
 Assistant General Counsel


 Marianne Abely
 Attorney

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